IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. [redacted]

DOROTHY SHELLEY,

vs.

S. S. KRESGE COMPANY, A corporation,

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Of Counsel.

BARNARD & MILLER, 19 S. MAIN ST., CLARENCE, NEW YORK, 1945

SUBJECT INDEX.

PAGE

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Facts 1

Answer of Respondent to Reasons Relied Upon by Petitioner for Granting of Certiorari

Part I 3

Part II 5

Brief of Respondent 7

Argument 7

Conclusion 10

TABLE OF CASES CITED.

Aetna Insurance Co. v. Kennedy, 301 U. S. 389 3

Baltimore & Carolina Line v. Redman, 295 U. S. 654 .. 3

Calvert v. Springfield Light Co., 231 Ill. 290; 83 N. E. 184-185; 14 L. R. A. (N. S.) 782; 12 Ann. Cas. 423 6

Murray v. Bedell Co., 256 Ill. App. 247 6

Slocum v. New York Life Insurance Co., 228 U. S. 364 3

RULE OF COURT CITED.

Rule 50(b) of the Federal Rules of Civil Procedure, 28 N. S. C. A. Sec. 723c 4

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 983

DOROTHY BRUNET,

Petitioner,

vs.

S. S. KRESGE COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, S. S. Kresge Company, a corporation, represents unto this Honorable Court as follows:

I.

The statement of the matter involved as set out by Petitioner in her brief filed herein correctly states the salient facts as to the cause of action herein. Counsel for

Petitioner has, however, misquoted some of the proceedings as set out in the second paragraph of Page 2 of their Petition. In this statement Petitioner states that at the close of all the evidence the Respondent made a motion for a directed verdict which motion the court denied *without reservation.* This is incorrect. In the transcript of record, Page 130, appears the defendant, S. S. Kresge Company's written motion for an instructed verdict of not guilty on which appears, written by the Trial Court in his handwriting, (Written notation) "Ruling Reserved." Following the verdict by the jury, the defendant below, S. S. Kresge Company, filed its written motion to set aside the verdict and to grant a new trial (R. 132-133). In that motion points were made that the Court erred in overruling the motion of the defendant to withdraw the evidence from the jury and refusing to find the defendant not guilty at the close of the plaintiff's evidence. A similar point was made that the Court erred in overruling the motion at the close of all the evidence. Points were also made (R. 133) that the plaintiff was guilty of contributory negligence as a matter of law and that the evidence failed to show any negligence on the part of the defendant. These same points were also raised in the defendant, S. S. Kresge Company's motion for a judgment for the defendant notwithstanding the verdict (R. 134-135).

As stated by counsel for Petitioner upon an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, the judgment of the court below was reversed with directions to the District Court "to dismiss on the merits".

ANSWER OF RESPONDENT TO REASONS RELIED UPON BY PETITIONER FOR GRANTING OF CERTIORARI.

Following the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, the plaintiff below and Petitioner here, filed a petition for rehearing (115 Fed. (2nd) 713), wherein it was contended that error had been committed by that court in directing that the court below dismiss the suit on the merits. The contentions made by Petitioner herein are answered by the United States Circuit Court of Appeals for the Seventh Circuit in 115 Fed. (2nd) 716, wherein the court calls attention to two cases mentioned by Petitioner, namely, *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, and *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389. It will be noted that the Circuit Court of Appeals indicated that in the *Slocum* case this Court laid down the very general rule that in case of the reversal of a judgment entered on a verdict which the Appellate Court found should be vacated for insufficiency of evidence to support it, the direction of the Appellate Court should be for a new trial rather than for the entry of a judgment for the defendant notwithstanding the verdict.

This rule was subsequently modified by this Court in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654. This Court based its express modification of the earlier ruling on a distinction which it found between the two cases in that in the earlier case there had been *no reservation of the ruling* on a motion for a directed verdict, whereas in the *Redman* case the ruling had been *expressly reserved* until after verdict when the court ruled on the sufficiency

of the evidence. This Court held that this presented a question of law rather than a question of fact and held that the Circuit Court of Appeals for the Second Circuit was in error in remanding for a new trial instead of directing dismissal of the cause on the merits.

These cases decided by this Court were apparently distinguishable because of the fact that the ruling had not been reserved by the Trial Court until after the return of the verdict. We have herein called this Court's attention to the misstatements of counsel for Petitioner in saying that the Trial Court denied the motion of the S. S. Kresge Company for a directed verdict *without reservation.* Such is not the fact but on the contrary the Court specifically wrote in long-hand "Ruling Reserved" (R. 130).

The United States Circuit Court of Appeals for the Seventh Circuit called attention to the adoption of new Federal Rules of Civil Procedure, 28 U.S.C.A., Section 723c, which the court stated had, in effect, done away with the distinction between the cases above cited as to whether or not there was an express reservation of ruling. Rule 50 (b) provides:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict * * * . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen

> the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. * * *"

The United States Circuit Court of Appeals for the Seventh Circuit not only followed this rule of civil procedure above quoted, but without it would have been correct in its direction to the Trial Court below since the ruling for a directed verdict below was denied and such ruling was expressly *reserved.*

In view of the foregoing decisions and rules of this Court, we contended then and do now that this defendant reserved its rights under said rule and under said decisions and was entitled to a dismissal of the case on the merits. In the *Redman* case this Court held under this same situation:

> "Whether the evidence was sufficient or otherwise was a question of law to be resolved by the Court. * * * The Court of Appeals held that the evidence was insufficient to support the verdict for the plaintiff; that the defendant's motion for a directed verdict was accordingly well taken; and therefore that the judgment for the plaintiff should be reversed. Thus far we think its decision was right. The remaining question relates to the direction which properly should be included in the judgment of reversal. It results that the judgment of the Court of Appeals should be modified by substituting a direction for a judgment of *dismissal on the merits* in place of the direction for a new trial and, as so modified, should be affirmed."

II.

Petitioner's reason No. III on page 4 of the Petition contends that the United States Circuit Court of Appeals for the Seventh Circuit in its decision did not follow the common law of the State of Illinois and calls attention to the fact that the four Illinois Appellate Courts are tribu-

nals of intermediary appellate jurisdiction and that the Supreme Court of Illinois is the highest court of last resort in the state.

In Petitioner's argument the contention is made that the Circuit Court of Appeals for the Seventh Circuit followed the case of *Murray* v. *Bedell Co.*, 256 Ill. App. 247, and that under the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 it was the duty of that Court to follow the Supreme Court of Illinois and not the Appellate Court of Illinois.

This statement and contention is incorrect. There once was a statute in Illinois giving certain legal effect to Appellate Court decisions. This statute has long since been repealed. A reading of the decision of the Circuit Court of Appeals in this case, 115 Fed. (2d) 713-715 clearly indicates and shows that that Court did not rely upon Appellate Court decisions alone. In its decision the Court called attention to the similarity of facts as shown in the Appellate Court case of *Murray* v. *Bedell Co.* and stated:

> "This conclusion is consistent with the general rule, as stated by the Illinois Supreme Court in *Calvert* v. *Springfield Light Co.*, 231 Ill. 290; 83 N. E. 184-185; 14 L. R. A. (N. S.) 782; 12 Ann. Cas. 423"

and then quoted from the Calvert case as applicable and controlling in the case at bar.